

PIONEER CONCRETE (MALAYSIA) SDN BHD

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v.

CELINI CORPORATION SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[COMPANIES WINDING-UP NO: 28-111-1997]
6 JUNE 1998

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COMPANY LAW: *Winding-up - Insolvency - Test of commercial insolvency - Disputed debt - Whether petition ought to be refused merely because debt is disputed - How to prove inability to pay debts - Companies Act 1965, s. 218(1)(e)*

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COMPANY LAW: *Winding-up - Notice of demand - Irregularity - Notice sent to previous registered address - Whether amounts to substantial injustice - Whether irregularity curable and could be remedied by court - Companies Act 1965, s. 218(2) - Companies (Winding-Up) Rules 1972, r. 194(1)*

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The petitioner sought to wind up the respondent company under s. 218(1)(e) of the Companies Act 1965 ('the Act') for failing to pay a debt. Accordingly, the petitioner served a notice of demand under s. 218(2)(a) of the Act by leaving a copy of the same at the registered address of the respondent company.

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The respondent resisted the petition on two grounds. Firstly, the respondent disputed the debt alleging that certain sums paid were not taken into account. Secondly, the respondent argued that the notice of demand was defective in that it was served to the wrong address thereby preventing them from receiving it.

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Held:

[1] The debt incurred by the respondent was not in dispute at all. Inability to pay debts under s. 218(e) of the Act is a common ground for a winding-up order. The petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motive may be.

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- a* [2] The test of commercial insolvency is whether the company is unable to meet its current debts as they fall due. A company may have substantial wealth which cannot be realised immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s. 218(1)(e) of the Act and this is so even though on liquidation the company will be able to meet all its liabilities.
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[3] Inability to pay is generally proved by service of the statutory notice under s. 218(2) of the Act or by other proof of insolvency.

- c* [4] The irregularity in the statutory notice did not cause any substantial injustice to the respondent. By r. 194(1) of the Companies (Winding-Up) Rules 1972, the irregularity in the statutory notice in regard to the registered address of the respondent, though it was not the fault of the petitioner, was curable and could be remedied by the court.
- d* [5] The real issue would be whether the respondent was able to pay its debts. Having proved a debt, the court is bound to give an order of winding-up. There was nothing to show that the respondent could pay its debts and for this reason the respondent should be wound up.

e [Petition allowed.]

Cases referred to:

- Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21 (*aff*)
- IOC Australia Pty Ltd v. Mobil Oil Australia* [1975] 49 ALJR 176 (*aff*)
- f* *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292 (*fol*)
- Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 (*aff*)
- Malayan Plant (Pte) Ltd v. Moscow Norodny Bank Ltd* [1980] 2 MLJ 53 (*aff*)
- MBf Finance Bhd v. Sri Hartamas Development Sdn Bhd* [1992] 1 CLJ 160 (*aff*)
- Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96 (*fol*)
- g* *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 (*aff*)
- Re Sunshine Securities Pte Ltd* [1978] 1 MLJ 57 (*aff*)
- Re Tweeds Garages Ltd* [1962] 1 Ch D 403 (*fol*)
- h* *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 105 (*refd*)
- Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637 (*aff*)
- Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4 (*aff*)

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Weng Wah Construction Co Sdn Bhd v. Foong Development Sdn Bhd [1994] 3 CLJ 511 (*refd*) a

YPJE Consultancy Service Sdn Bhd v. Heller Factory (M) Sdn Bhd [1996] 3 CLJ 51 (*aff*)

Legislation referred to:

Companies Act 1965, s. 218(1)(e), (2)(a) b

Companies (Winding-Up) Rules 1972, r. 194(1)

For the petitioner - Song Lian Gek; M/s Zaid Ibrahim & Co

For the respondent - Matthews George; M/s R Muthu & Co

Reported by S Dharmendran c

JUDGMENT

Abdul Malik Ishak J:

The respondent, Celini Corporation Sdn Bhd, was incorporated on 9 December 1992 under the Companies Act 1965, with its registered office at room 204, 2nd floor, Chevron Complex 1-3, Jalan Sisir 1, Taman Seraya, Kulai Besar, 81000 Kulai, Johor. The nominal capital of the respondent was said to be 100,000 shares divided into RM1 each and its paid up capital was said to be RM100,000. The objects of the respondent were, *inter alia*, to deal, distribute and transact wire mesh, tiles, bricks and other building materials. The respondent was indebted to the petitioner, Pioneer Concrete (Malaysia) Sdn Bhd, to the tune of RM462,819.50 being the balance of the purchase price of goods sold and delivered together with interest at the rate of 1% per month. The respondent failed, neglected and/or wilfully refused to pay to the petitioner the sum of RM462,819.50 notwithstanding numerous demands by the petitioner. A notice of demand dated 8 July 1997 pursuant to s. 218 of the Companies Act 1965 was duly served on the respondent by leaving a copy of the same at the registered address of the respondent as mentioned aforesaid on 10 July 1997. The petitioner believed that the respondent was insolvent under the provisions of s. 218 of the Companies Act 1965 and that the respondent was unable to pay its debt. It was said that it was just and equitable that the respondent be wound up. The petitioner prayed for the following prayers in encl. 2 para. 8: d

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(a) that the respondent may be wound up by the court under the provisions of the Companies Act 1965;

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- a* (b) that a liquidator be appointed;
- (c) that the petitioner be allowed costs of and incidental to the winding up which would be taxed by the proper officer of the court and paid out of the assets of the respondent; and
- b* (d) such other order as may be made in the premises as shall be just.

c Miss Song Lian Gek, learned counsel for the petitioner, rightly pointed out that there were two potent issues raised by the respondent in the affidavit of reply affirmed by Chin Kwai Sun on 3 November 1997 as reflected in encl. 5. I will now deal with these two issues, not in its order of merit.

The Debt Of RM462,819.50 Was In Dispute

- d* The respondent disputed the debt and alleged that the petitioner did not take into account those sums which had been paid particularly the sum of RM152,349 as reflected in exh. "C1" of encl. 5. It is interesting to note that exh. "C1" of encl. 5 showed that the sum of RM152,349 was payment made for November 1996 whereas the petition in encl. 2 which itemised the debt
- e* to be RM462,819.50 was for the period from 2 December 1996 till 3 March 1997 – see annexure "A" thereof. This would clearly put the argument of Mr. Mathews George for the respondent to an end. In fact, the petitioner to make doubly certain exhibited the same exhibit in encl. 8 marked as "LKH 1" which showed that the debt due was RM462,819.50 and not something else. A
- f* passage from the judgment of Plowman J in *re Tweeds Garages Ltd* [1962] 1 Ch D 403 merits reproduction. That passage would nip in the bud the problem as raised by Mr. Mathews George and that passage reads as follows (see p. 413 of Plowman J's decision):
- g* From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would, in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing. If I may refer
- h* to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for 10,000 pound and after the date of the judgment is paid off. There is a genuine *bona fide* dispute whether the sum paid off is 10 pound or 20 pound. The creditor then
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presents a petition to have the company wound up. Is the company to be entitled to say: 'It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?' I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.

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In my judgment, the debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s. 218(1)(e) of the Companies Act 1965 is a common ground for a winding-up order. It is a correct statement of the law to say and I so say that *prima facie*, the petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent (*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96). It is germane to mention that the test of commercial insolvency is simple. It is this. Whether the company is unable to meet its current debts as they fall due? A company may have substantial wealth which cannot be realised immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s. 218(1)(e) of the Companies Act 1965 and this is so even though on liquidation the company will be able to meet all its liabilities: *Re Sunshine Securities Pte Ltd* [1978] 1 MLJ 57; *Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v. Moscow Norodny Bank Ltd* [1980] 2 MLJ 53; *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *MBf Finance Bhd v. Sri Hartamas Development Sdn Bhd* [1992] 1 CLJ 160, 169; *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449, 454 and *P.T. Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21, 29.

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Generally, inability to pay is proved by service of the statutory notice under s. 218(2) of the Companies Act 1965 or for that matter by other proof of insolvency. This brings me to the next issue raised by the respondent.

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The Statutory Notice Under S. 218 (2)(a) Of The Companies Act 1965 Was Defective

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The statutory notice was exhibited as annexure "B" of the petition in encl. 2 and it was worded thus:

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*a***NOTICE****PURSUANT TO SECTION 218 OF THE
COMPANIES ACT, 1965***b*

TO: M/s CELINI CORPORATION SDN BHD,
Room 204, 2nd Floor,
Chevron Complex 1-3,
Jln Sisir 1, Tmn Seraya,
Kulai Besar,
81000 Kulai,
c Johor.

**RE: OUTSTANDING SUM OF RM462,819.50 AND INTEREST
THEREON OUTSTANDING AMOUNT FOR GOODS SOLD
AND DELIVERED***d*

TAKE NOTICE that you are now required to pay to us as Solicitors for Messrs. Pioneer Concrete (Malaysia) Sdn Bhd. of Level 2, Block D, Kompleks Pejabat Damansara, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur the sum of Ringgit Malaysia Four Hundred Sixty Two Thousand and Eight Hundred Nineteen and cents Fifty (RM462,819.50) only within twenty-one (21) days from the date of the service of this Notice, failing which you shall be deemed to be unable to pay outstanding Judgment sum under Section 218(1)(e), Companies Act, 1965 and appropriate action will be taken for the winding-up.

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Dated this 8th July 1997.

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Sgd (Illegible)

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Messrs Zaid Ibrahim & Co,
Advocates & Solicitors,
Unit 11.02, Level 11,
g Wisma LKN,
Jalan Wong Ah Fook,
Tel: 07-2248145

[workfile: SLG/PC/GEN.let]

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As can be seen the statutory notice was forwarded to the respondent's address at:

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Room 204, 2nd Floor,
Chevron Complex, 1-3,
Jalan Sisir 1, Taman Seraya,
Kulai Besar,
81000 Kulai,
Johor.

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and this address was said to be the registered address of the respondent based on the search conducted with the Registrar of Companies in Johor Bahru. The affidavit-in-reply of the petitioner as affirmed by Lee Kiat Hean on 14 November 1997 in encl. 8 of para. 8 and exh. "LKH 3" annexed thereto bore out this fact. Exhibit "LKH 3" of encl. 8 bore these intimate details:

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AIM MANAGEMENT & SERVICES SDN BHD
COMPANY SEARCH FORM

NAME OF COMPANY : CELINI CORPORATION SDN BHD

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CHANGE OF NAME TO : NIL

R.O.C. TEMPATAN NO : 253776-W

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DATE OF
INCORPORATION : DECEMBER 9, 1992

DATE OF LATEST
ANNUAL RETURN : JUNE 30, 1996

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REGISTERED OFFICE : ROOM 204, 2ND FLOOR,
CHEVRON COMPLEX, 1-3,
JLN SISIR 1,
TMN SERAYA,
KULAI BESAR,
81000 KULAI, JOHOR.

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FACTORY OFFICE : 145, JLN SEROJA 39,
TMN JOHOR JAYA,
81100 JOHOR BAHRU.

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AR LODGE/FILED BY : RAPID MGMT CONSULTANCY,
ROOM 204, 2ND FLOOR,
CHEVRON COMPLEX, 1-3,
JLN SISIR 1,
TMN SERAYA, KULAI BESAR,
81000 KULAI, JOHOR.

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- a* TEL NO. : 07-6622335
- AUTHORISED CAPITAL : RM1,000.00
- PAID-UP CAPITAL : RM100.00

- b* PESURUHJAYA SUMPAH
- Sgd (Illegible)
- No. W 207
- S. Sundareson, AMN
- c* 122A, Jalan Burhanuddin Helmi,
Taman Tun Dr. Ismail,
60000 Kuala Lumpur.

- d* Another significant fact to highlight would be this. Thai Jiin Peir affirmed an affidavit of service in regard to s. 218 notice on 4 November 1997 as seen in encl. 10 and at para. 3 thereof it was deposed that on 10 July 1997, a s. 218 notice was served on the registered office of the respondent at the aforesaid address by delivering and leaving a copy of that notice at the aforesaid address. Mr. Mathews George drew my attention to the affidavit-in-reply of Chin Kwai Sun affirmed on 3 November 1997 as reflected in encl.
- e* 5 particularly to para. 7 where it was deposed that Rapid Management Consultancy filed on 21 January 1997 a change of the respondent's registered office from the aforesaid address to No: 8-2, Jalan Harimau, Taman Century, 80250 Johor Bahru, Johor and this change of address prevented the respondent from receiving the statutory notice. Malek Ahmad J (now JCA) in *Weng Wah Construction Co Sdn Bhd v. Foong Development Sdn Bhd* [1994] 3 CLJ 511; [1994] 2 MLJ 266, 267 was concerned that there must be adequate proof of physical delivery of the demand to the company especially when the letter of demand had been sent by registered post to the registered office of the company. Zakaria Yatim J (now FCJ) in *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 105, 111 was of the view that the demand must be in writing and signed by the creditor or his authorised agent and it must also specify the sum due. His Lordship Zakaria Yatim J (now FCJ) was also of the view that the demand must be served at the registered office of the company. On the other end of the scale, we have magnanimous judges like Abu Mansor J
- g* (now JCA) who in *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292; [1990] 2 MLJ 46 held that minor irregularities in the statutory demand could be waived and that the real issue of the day was whether the company was able to pay its debts, and the evidence before his
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Lordship was that the company was indeed insolvent. The court in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 MLJ 313 held that a mistake in the statutory demand regarding the time available for the debtor to pay was not fatal and it did not vitiate the demand. I adopt the liberal approach of Abu Mansor J (now JCA) in *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd (supra)* and held that the irregularity in the statutory notice did not cause any substantial injustice to the respondent and this conclusion gained support by an affidavit in encl. 8 para. 12 which deposed that the accounts clerk with the respondent had spoken over the telephone with Lee Kiat Hean and it was intimated that the respondent was making an attempt to pay the debt of RM462,819.50 by instalments. On four previous occasions when the case came up for hearing, Miss Song Lian Gek informed the court that the parties were negotiating a settlement. The respondent would not be interested to negotiate a settlement unless they knew that they were indeed indebted to the petitioner. If the respondent knew about the debt, they must by inference receive the statutory notice and I cannot help but feel constrained to say that they knew about the debt and was buying time. The real issue of the day would be whether the respondent was able to pay its debts. There is authority for the proposition that having proved a debt, like the petitioner here, the court is bound to give an order of winding-up (*Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4; and *IOC Australia Pty Ltd v. Mobil Oil Australia* [1975] 49 ALJR 176) and applying these authorities, I am constrained to wind-up the respondent. Ahmad Fairuz Sheikh Abdul Halim JCA in *YPJE Consultancy Service Sdn Bhd v. Heller Factory (M) Sdn Bhd (Formerly known as Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51 focussed his mind to the critical issue of whether or not the company was able to pay its debts. This was what his Lordship said at p. 60 of the report:

Concerning the matter of the amount being incorrect or unclear the learned Chief Justice referred to the case of *Dikwa Holdings Pty. Ltd. v. Oakbury Pty. Ltd.* [1992] 8 ACSR 53 (which involved a notice that stated a quantum in excess of the debt owed) and referred what Justice Wilcox said – that is ‘even if the notice over-stated the amount owing it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts.’ This, according to the Chief Justice, ‘must be the correct approach’. After reviewing the evidence in the case the learned Chief Justice resolved that the company was unable to pay its debts and that on the balance of probabilities the debt involved exceeded \$1,000.00. I am in full agreement with the rationale that has been expounded in the cases which had been referred to above. And in this appeal, the notice of demand showed that the total principal amount owing

- a* far exceeded the quantum of \$500.00. Applying the reasoning in the cases from Australia, *The Oriental Bank Bhd.* and *Re Tweeds Garages Ltd.*, I am of the view that the points raised in paragraph 3(a) could not be sustained.

At p. 62 of the report, his Lordship continued:

- b* What is obvious from the two issues raised by the learned Counsel for the appellant is that the issue are on matters of technicalities. On this the learned Kaikaus J. said, 'The English system of administration of justice on which our own is based, may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The
- c* ideal must always be a system that gives to every person what is his.' (*Imtiaz Ahmad v. Ghulam Ali* PLD 1963 SC 382 at page 400). Admittedly, what had been uttered by the learned judge Kaikaus, pertains to or was in the context of civil procedure. But what is important is the principle on technicality in the system of justice. In this appeal, what has not been quantified is the interest
- d* on the principal amount. The question that arises is whether the petition should be dismissed merely on that ground, when it is clear that the principal amount stated in the notice has not been disputed and the quantum stated in the notice was a quantum which was far more than RM500.00. Similar issue arises concerning the verifying affidavit which contained the same date as that contained in the petition. Is it just that the petition be dismissed only for the
- e* reason that the date was one which was not dated after a date stated in the petition when it was clear from the affidavit that the affidavit refers to that petition itself. The substantive matter in this appeal is the capability of the appellant in paying its debts, and there was no evidence that had been forwarded that could show the capability of the respondent company in paying off its debts. Because of that I am respectfully of the view that this appeal
- f* should be dismissed with costs and the deposit to be given to the respondent to account of taxed costs.

Rule 194(1) of the Companies (Winding-Up) Rules 1972 states:

- g* 194(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

- h* and applying it vigorously to the factual matrix of the present case would mean that the irregularity in the statutory notice in regard to the registered address of the respondent, though it was not the fault of the petitioner, was curable and could be remedied by this court. There was no material to show that the respondent could pay its debts and for this simple reason the respondent should be wound up.

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For the reasons adumbrated above, I allowed encl. 2, para. 8(a), para. 8(b) (with the official receiver as the provisional liquidator) and para. 8(c). *a*

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